IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RALPH NICKERSON, Plaintiff, v. THE PORTLAND POLICE BUREAU, The Police Agency for the CITY OF Portland, Municipal Corporation, PETER C. HART PPB, Defendant.	No. CV-08-217-HU FINDINGS & RECOMMENDATION

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Plaintiff *Pro Se*

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HUBEL, Magistrate Judge:

Pro se plaintiff Ralph Nickerson filed this action on February 22, 2008, and effected service on the City of Portland Police

Bureau on March 4, 2008 (dkt #3). On March 24, 2008, the City of Portland moved to dismiss the Complaint (dkt #4). In response, plaintiff filed a document captioned "Plaintiff Reply to DEFENDANTS Motion to Dismiss," on April 7, 2008 (dkt #10). On April 15, 2008, the City of Portland filed a reply to plaintiff's April 7, 2008 filing (dkt #11).

Although plaintiff's April 7, 2008 filing is captioned a "reply," it is obvious from the content of the document that the filing is an Amended Complaint. The document also bears a footer which reads "Plaintiff amended complaint." Thus, in an April 22, 2008 Order (dkt #12), I (1) construed plaintiff's April 7, 2008 filing as an Amended Complaint (dkt #10); (2) denied the motion to dismiss the original Complaint as moot; (3) construed the City of Portland's April 15, 2008 reply filing (dkt #11) as a motion to dismiss directed at the Amended Complaint; and (4) gave plaintiff time to respond to the merits of the City of Portland's arguments directed at dismissing the Amended Complaint and gave the City of Portland time to file a reply.

Accordingly, pending before the Court is the City of Portland's motion to dismiss (dkt #11) the Amended Complaint (dkt #10). I recommend that the motion be granted.

BACKGROUND

I recite the facts as alleged in the Amended Complaint. Plaintiff asserts that on February 22, 2006, he was driving a car in the City of Portland and was followed by two City of Portland police officers in a patrol car. Am. Compl. at ¶¶ 5, 6. Plaintiff pulled over to the curb to park his car. Id. at ¶ 5. Immediately after he parked, and exited the car, the police offers activated

their overhead lights on the patrol car. Id. at ¶ 6.

Plaintiff alleges that he believed he had not broken any laws and thus, he "expressed his resentment" at being stopped, detained, and interrogated. Id. at ¶ 7. Plaintiff was then cited for violating Oregon Revised Statute § (O.R.S.) 811.400 for failing to properly signal before parking. Id. at ¶ 8. He was later convicted of the violation and the Oregon Court of Appeals affirmed his conviction without opinion. Id.

STANDARDS

On a motion to dismiss, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002).

In civil rights cases involving a plaintiff proceeding pro se, this Court construes the pleadings liberally and affords the plaintiff the benefit of any doubt. McGuckin v. Smith, 974 F.2d 1050, 1055 (9th Cir. 1992), overruled on other grounds, WMX Tech., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1998); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). Before dismissing a pro se civil rights complaint for failure to state a claim, the court supplies the plaintiff with a statement of the complaint's deficiencies. McGuckin, 974 F.2d at 1055; Karim-Panahi, 839 F.2d at 623-24.

DISCUSSION

Although not artfully pleaded, a liberal reading of the Amended Complaint suggests that plaintiff brings the following

claims: (1) a claim that O.R.S. 811.400 is unconstitutionally vague; Am. Compl. at ¶ 4 ("plaintiff now ask[s] the Federal Court to decide if [] ORS 811.400 is unconstitutionally vague[.]"); ¶ 9 ("the directive is vague");

(2) a claim that O.R.S. 811.400 is an unconstitutional *ex post facto* law; Am. Compl. at ¶ 4 ("plaintiff now ask[s] the Federal Court to decide if [] ORS 811.400 is unconstitutionally . . . *ex post facto*[.]"); ¶ 9 (suggesting that the imposition of the maximum fine under O.R.S. 811.400 resulted in an *ex post facto* conviction);

(3) a claim that the City has a municipal policy of citing persons for violating O.R.S. 811.400 when O.R.S. 811.375, a different statute, carrying a lesser maximum fine, would be more appropriate; Am. Compl. at ¶ 9 ("the claim against the City of Portland is that the municipal policy has a practice of assessing ORS 811.400 when in cases such as here, ORS 811.375 is clearly more appropriate"); and

(4) a claim against individual defendant Portland Police Officer Peter Hart for race discrimination based on plaintiff's assertion that he received this citation because he is African-American. Am Compl. at ¶ 12 ("Officer Hart . . .issued a citation . . . simply because of the plaintiff['s] race[.]").

In response to the City's motion to dismiss (which, as noted above, was originally filed as a reply memorandum but which I construed as a motion to dismiss directed at the Amended Complaint), on May 19, 2008, plaintiff filed a "Motion to Amend in Response to Defendant City of Portland Motion to Dismiss" (dkt #15). I construe this filing as simply a response to the motion to dismiss the Amended Complaint. I do not consider the May 19, 2008

response by plaintiff as amending the complaint or as adding any new claims.

Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading once as a matter of course before being served with a responsive pleading or within twenty days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar. Fed. R. Civ. P. 15(a)(1). In all other cases, the party may amend only with the opposing party's written consent or with leave of the Court. Fed. R. Civ. P. 15(a)(2).

Here, plaintiff's April 7, 2008 filing, which was construed as an Amended Complaint, was his one time amendment as a matter of course under Rule 15(a). Any subsequent amendments required consent of defendants or leave of Court. Because plaintiff fails to demonstrate defendants' consent to the filing of what would be a second amended complaint, and plaintiff has not sought or obtained leave of Court for filing a second amended complaint, I view plaintiff's May 19, 2008 filing only as a response to the pending motion to dismiss the Amended Complaint. I disregard any allegations which attempt to assert new claims.

The City makes several arguments in support of its motion to dismiss. I address them in turn.

A. Portland Police Bureau as a Defendant

The Amended Complaint names the Portland Police Bureau as a defendant. However, as judges in this Court have explained on more than one occasion, "[t]he Portland Police Bureau is not a separate entity from the City of Portland and is not amenable to suit. It is merely the vehicle through which the city fulfills its police

functions." Nwerem v. City of Portland/Portland Police Bureau, No. CV-06-1054-MO, 2006 WL 3228775, at *2 n.1 (D. Or. Nov. 6, 2006); see also Haliburton v. City of Albany Police Dep't, No. CV-04-6062-KI, 2005 WL 2655416, at *2-3 (D. Or. Oct. 18, 2005) (dismissing all claims against municipal police department absent showing that City intended to create a separate legal entity when it formed the police department).

I recommend that the City's motion to dismiss the Portland Police Bureau as a defendant, be granted. And, because, as discussed below, plaintiff's claims are subject to dismissal, with prejudice, even if a municipal defendant could be named in place of the Portland Police Bureau, it is futile to allow plaintiff to amend.

B. Unconstitutionally Vague

It appears that plaintiff brings his unconstitutional vagueness claim against the City. However, O.R.S. 811.400 is a state statute, not enacted by the City of Portland. Mere enforcement of a state statute is not, without more, a sufficient basis for imposing section 1983 municipal liability. See Surplus Store & Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791-92 (7th Cir. 1991) (without more, "policy" of enforcing state law "simply cannot be sufficient to ground liability against a municipality"). Moreover, in his May 19, 2008 response, plaintiff concedes that the City is not a proper defendant to his vagueness challenge. Pltf's May 19, 2008 Resp. at p. 6.

Even assuming that plaintiff could substitute another entity or person as a defendant in this claim, it would be futile because plaintiff's void for vagueness challenge fails to state a claim.

"[A] party challenging the facial validity of [a statute] on vagueness grounds outside the domain of the First Amendment must demonstrate that the enactment is impermissibly vague in all of its applications." Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 972 (9th Cir.2003) (internal quotation omitted). "[T]he challenger must establish that no set of circumstances exists under which the [statute] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).

"A statute is void for vagueness when it fails to give adequate notice to people of ordinary intelligence of what conduct is prohibited, or if it invites arbitrary and discriminatory enforcement." United States v. Hungerford, 465 F.3d 1113, 1117 (9th Cir. 2006) (internal quotation omitted), cert. denied, 127 S. Ct. 2249 (2007). "The notice test of vagueness looks at the 'very words' of the statute in question to determine whether the statutory language is sufficiently precise to provide comprehensible notice of the prohibited conduct. Anderson v. Morrow, 371 F.3d 1027, 1031-32 (9th Cir. 2004) (internal quotation omitted).

Additionally, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. . . . One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 7 (1982) (citations and internal quotations omitted). Thus, "if the statute is constitutional as applied to the individual asserting the challenge, the statute is facially valid." United States v. Dang, 488 F.3d 1135, 1141 (9th Cir.

2007), cert. denied, 128 S. Ct. 1288 (2008).

"Whether a [statute] is unconstitutionally vague is a question of law[.]" United States v. Erickson, 75 F.3d 470, 475 (9th Cir. 1996). Questions of law may be resolved on a motion to dismiss. See Knievel v. ESPN, 393 F.3d 1068, 1072-73 (9th Cir. 2005) (appropriate for district court to determine issue of law in defamation claim, on motion to dismiss); Reagan v. Bredesen, No. 3:07-CV-199, 2008 WL 901496, at *2 (E.D. Tenn. Mar. 3, 2008) (analyzing whether law was void for vagueness in context of a motion to dismiss); Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 945 F. Supp. 1355, 1378-79 (D. Or. 1996) (same).

O.R.S. 811.400 provides as follows:

> (1) A person commits the offense of failure to use an appropriate signal for a turn, lane change or stop or for an exit from a roundabout if the person does not make the appropriate signal under ORS 811.395 by use of signal lamps or hand signals and the person is operating a vehicle that is:
>
> (a) Turning, changing lanes, stopping or suddenly decelerating; or
>
> (b) Exiting from any position within a roundabout.
>
> (2) This section does not authorize the use of only hand signals to signal a turn, change of lane, stop or deceleration when the use of signal lights is required under ORS 811.405.
>
> (3) The offense described in this section, failure to use appropriate signal for a turn, lane change or stop or for an exit from a roundabout, is a Class B traffic violation.

O.R.S. 811.400.

Based on the plain language of the statute, it is not unconstitutionally vague. Ordinary people can understand its meaning - the statute requires the use of an appropriate signal

when making a turn, moving from one lane to another, stopping, or exiting a roundabout.

Moreover, here, according to the Amended Complaint, plaintiff moved his car from a moving lane of traffic to the parking lane. Am. Compl. at ¶ 5 (alleging that after accelerating to a reasonable speed, he moved the car from left to right and pulled to the curb to park). He does not allege that he used a signal, as required by O.R.S. 811.400. See State v. Thomas, 104 Or. App. 126, 129-130, 799 P.2d 208, 210 (1990) ("duty to signal before making a lane change under ORS 811.400(1) attaches when a driver moves from an on-street parking lane into the traffic lane."). As such, the statute clearly applies to his conduct. He was convicted of the traffic offense and his conviction was affirmed on appeal. Am. Compl. at ¶ 8.

Plaintiff's "void for vagueness" challenge should be dismissed with prejudice. The statute is not unconstitutionally vague because people of ordinary intelligence can understand its meaning, it proscribes only certain, limited conduct and therefore, does not invite arbitrary and discriminatory enforcement, and plaintiff engaged in conduct prohibited by the challenged statute.

C. Ex Post Facto

The precise nature of plaintiff's "*ex post facto*" claim is unclear. He states that he "ask[s] the Federal Court to decide if [] ORS 811.400 is unconstitutionally . . . ex post facto" where he was convicted for conduct which he contends is also regulated by a separate statute carrying a "lesser penalty and superior defense." Am. Compl. at ¶ 4. He later asserts that his conviction under O.R.S. 811.400 is "*ex post facto*" because his acts were innocent.

Id. at ¶ 9.

In his May 19, 2008 response, plaintiff concedes his *ex post facto* claim. Pltf's May 19, 2008 Resp. at p. 7. This claim should be dismissed with prejudice.

D. Municipal Liability Claim

In this claim, plaintiff asserts that the City of Portland maintains an unlawful policy of citing citizens for violating O.R.S. 811.400 when O.R.S. 811.375, carrying a lesser fine, is more appropriate. Am. Compl. at ¶ 9. It appears that plaintiff contends this policy violates the *Ex Post Facto* Clause. Id. It is unclear whether he concedes this municipal *ex post facto* claim in his May 19, 2008 Response.

The problem with plaintiff's argument here, even assuming it states a claim in all other respects, is that the two statutes regulate different conduct and thus, the two statutes do not allow for discretionary enforcement at all, much less encourage a policy of discretionary enforcement that is somehow unconstitutional.

O.R.S. 811.400 is quoted above. O.R.S. 811.375 is entitled "Unlawful or unsignaled change of lane; penalty." It provides:

> (1) A person commits the offense of unlawful or unsignaled change of lanes if the person is operating a vehicle upon a highway and the person changes lanes by moving to the right or left upon the highway when:
>
> (a) The movement cannot be made with reasonable safety;
>
> (b) The driver fails to give an appropriate signal continuously during not less than the last 100 feet traveled by the vehicle before changing lanes.
>
> (2) Appropriate signals for use while changing lanes are designated as under ORS 811.395 and 811.400.
>
> (3) The offense described in this section, unlawful or unsignaled change of lane, is a Class D traffic

violation.

O.R.S. 811.375.

Plaintiff contends that O.R.S. 811.375 provides that a signal when changing lanes is not necessary when the lane change may be made with reasonable safety. Am. Compl. at ¶ 9 ("ORS 811.375 also includes reasonable safety as a criteria"; further suggesting that by citing plaintiff under O.R.S. 811.400 and not O.R.S. 811.375, the City "depriv[ed] the plaintiff of a defense" of changing lanes with reasonable safety.).

The plain language of the statute refutes plaintiff's argument. The statute first provides that it is unlawful to change lanes by moving to the right or left, when such movement cannot be made with reasonable safety. O.R.S. 811.375(1)(a). This part of the statute applies whether or not the driver has appropriately signaled. The conduct regulated in subsection (1)(a) is an unsafe lane change, regardless of the use of a signal. Thus, plaintiff errs when he contends that the City maintains a policy of citing to a statute which deprives drivers of a "reasonable safety" defense. The "reasonable safety" language in subsection (1)(a) is not a defense and the provision bears no relation to signaling.

Second, subsection (1)(b) governs the length of time the signal should be activated before commencing the lane change. Here, a driver who signals, but only immediately preceding the lane change, could still violate the statute. Thus, O.R.S. 811.375(1)(b) and O.R.S. 811.400(1) do not necessarily overlap.

I recommend that plaintiff's municipal liability claim be dismissed with prejudice.

/ / /

E. Racial Discrimination Claim

As indicated above, plaintiff contends that Officer Hart followed him and then cited him for the traffic violation because of plaintiff's race. Although plaintiff does not articulate the precise constitutional basis for his claim, I construe his allegations to assert a claim that he was treated differently because of his race in violation of the Equal Protection Clause of the Fourteenth Amendment.

The City argues that the claim must be dismissed (1) under Heck v. Humphrey, 512 U.S. 477 (1994); (2) under the Rooker-Feldman doctrine; or (3) because the officer had probable cause for the traffic stop and thus, his subjective intent is irrelevant. I reject all of these arguments. However, I agree with the City that plaintiff cannot add Officer Hart as a party in his Amended Complaint because it is untimely.

1. Heck

Generally, Heck directs lower courts to consider whether a judgment in favor of a plaintiff in a section 1983 action "would necessarily imply the invalidity of his conviction or sentence[.]" Id. at 487. If it would, the section 1983 action must be dismissed unless the plaintiff can prove that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . ., or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. 2254." Id. at 486-87.

Assuming that a successful Fourteenth Amendment racial discrimination claim would otherwise be barred by Heck because it necessarily implies the invalidity of plaintiff's conviction, but

see Clarke v. New Jersey State Police, No. 03-3240 (SRC), 2007 WL 4554254, at *5-6 (D.N.J. Dec. 20, 2007) (Heck inapplicable to allegations of unconstitutional racial profiling), Heck is not applicable here because plaintiff has never been incarcerated as a result of his traffic conviction. Under relevant Ninth Circuit law, if federal habeas relief is not available to the section 1983 plaintiff, Heck does not apply.

In Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002), the plaintiff brought a section 1983 action challenging the revocation of good-time credits and the imposition of administrative segregation following a prison disciplinary proceeding. The district court dismissed the case based on Heck. But, by the time the plaintiff's appeal was heard by the Ninth Circuit, the plaintiff had been released from prison and was on parole.

On appeal, the Ninth Circuit noted that as a result of his release, any federal habeas challenge to the disciplinary proceedings would be dismissed as moot, as plaintiff had "fully served the period of incarceration that he is attacking." Id. at 875-76. Although a prisoner who has completed a sentence and seeks to challenge his or her conviction in habeas may do so because of the "collateral consequences that survive [the prisoner's] release," habeas is not available to former prisoners who attack a deprivation of good-time credits because such former prisoners, like those former prisoners who challenge a term of incarceration for a parole violation, have no collateral consequences stemming from the challenged action. Id. (citing Spencer v. Kemna, 523 U.S. 1, 14-16, 18 (1998)).

The Ninth Circuit then inquired whether the unavailability of

a remedy in habeas corpus because of mootness permitted the plaintiff to maintain a section 1983 action for damages, even though success in that action would imply the invalidity of a disciplinary proceedings that caused the revocation of the good-time credits. Id. at 876. Analyzing Heck and Spencer, the court concluded that the plaintiff could maintain the action. Id. at 877. Otherwise, "the convict given a fine alone . . . would always be ineligible for § 1983 relief." Spencer, 523 U.S. at 21, n.* (Souter, J., concurring).

As the Ninth Circuit subsequently explained:

> Nonnette was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when the individual immediately pursued relief after the incident giving rise to those claims and could not seek habeas relief only because of the shortness of his prison sentence.

Guerrero v. Gates, 442 F.3d 697, 705 (9th Cir. 2006)[1]; see also Cole v. Doe 1 Thru 2 Officers of the City of Emeryville Police Dep't, 387 F. Supp. 2d 1084, 1092 (N.D. Cal. 2005) ("[u]nder Ninth Circuit law, . . ., where habeas is not available through no fault of the plaintiff, Heck does not bar a § 1983 claim.").

Here, the allegations in the Amended Complaint indicate that

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[1] Guerrero underscores the need to examine why habeas relief is unavailable to a section 1983 plaintiff whose claim would, if successful, necessarily invalidate an underlying conviction. As the Guerrero court explained, if habeas relief is unavailable because of a plaintiff's failure to timely pursue habeas remedies, Heck will still bar the section 1983 claim. 442 F.3d at 704-05 (refusing to "extend the relaxation of Heck's requirements" when failure to timely achieve habeas relief was self-imposed); see also Cunningham v. Gates, 312 F.3d 1148 (9th Cir. 2002) (Heck applied to claim brought by plaintiff, still in prison, because plaintiff let time to file habeas petition, expire). The facts in the instant case are analogous to those in Nonnette, not Guerrero or Cunningham.

plaintiff was fined upon conviction of the traffic offense for which Officer Hart cited him, but he was never incarcerated. Thus, he has no habeas remedy available to him. Moreover, the unavailability of habeas is not related to a lack of diligence on plaintiff's part. With no habeas remedy available, and no allegations of any collateral consequences stemming from a traffic conviction, Heck does not bar plaintiff's section 1983 equal protection claim. Mendoza v. Meisel, No. 07-4627, 2008 WL 726860, at *1 (3d Cir. Mar. 19, 2008) (when plaintiff was never incarcerated or otherwise in custody, federal habeas relief was never available and, therefore, Heck cannot apply)

2. Rooker-Feldman

Under Rooker-Feldman, lower federal courts lack subject matter jurisdiction to conduct appellate review of state court proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fideltiy Trust Co., 263 U.S. 413, 416 (1923). Rooker-Feldman clearly bars a claim which seeks the "undoing of the prior state court judgment[.]" Bianchi v. Rylaarsdam, 334 F.3d 895, 900 (9th Cir. 2003). Thus, Rooker-Feldman would have applied to plaintiff's claim, raised in the original Complaint, that his conviction should be overturned.

Plaintiff's Amended Complaint does not, however, seek to overturn his conviction. Rather, he seeks only damages. But, Rooker-Feldman applies not only to claims actually raised before the state court, but also to claims that are "inextricably intertwined" with state court determinations. Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003). Defendant contends that the race discrimination allegation against Officer Hart is "inextricably

intertwined" with the traffic offense conviction and thus, under Rooker-Feldman, this court lacks jurisdiction over the race discrimination claim.

I disagree. A recent case from the Middle District of Pennsylvania concluded that a racial discrimination claim directed at local police officials was not subject to dismissal under Rooker-Feldman because the claim was not a de facto attack on the state court judgment of conviction. Rose v. Mahoning Township, No. 3:07cv1305, 2008 WL 918514, at *6 (M.D. Pa. Mar. 31, 2008). There, the court explained that

> [P]laintiff's claim[] of constitutional violation of racial discrimination/racial profiling, is not the equivalent to an appeal of a final state court judgment. In order to prevail on an equal protection claim in the racial profiling context, plaintiff must establish that he is a member of a protected class and similarly situated to others not within the protected class who were not prosecuted. . . . Thus, plaintiff does not have to establish that he was innocent of the underlying charge, or that the state court judgment was invalid, but merely that others similarly situated, but not within the protected class, were not prosecuted.

Id. (citation omitted).

While Rose is not binding on this Court, I agree with its assessment of the relationship between the race discrimination claim and the underlying conviction. The injury at issue in plaintiff's race discrimination claim is best described as the sting from being targeted by the police based solely on one's race. The injury does not depend on plaintiff's guilt or innocence. Thus, the injury does not stem from the state court judgment and as such, Rooker-Feldman does not require dismissal of the claim.

3. Probable Cause

The City argues that because Officer Hart had probable cause

to cite plaintiff for violating O.R.S. 811.400, his subjective motivation, even if based on race, is irrelevant. Tatum v. City & County of San Francisco, 441 F.3d 1090, 1094 (9th Cir. 2006) ("If the facts known to an arresting officer are sufficient to create probable cause, the arrest is lawful, regardless of the officer's subjective reasons for it.").

The problem with the City's argument here is that it is directed toward a Fourth Amendment claim, not a Fourteenth Amendment claim. Plaintiff's race discrimination claim does not contend there was no probable cause for the citation. Rather, he states that Officer Hart followed him and cited him because of his race.

In Whren v. United States, 517 U.S. 806, 813 (1996), the Supreme Court held that consistent with the Fourth Amendment, police can temporarily detain a motorist when they have probable cause to believe that he violated a traffic ordinance, even if the police have some other motivation to stop the motorist. But, the Whren Court made clear that the right to equal protection may be violated even if the actions of the police are acceptable under the Fourth Amendment. Id. The Court noted that "the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." Id.; see also Gibson v. Superintendent of New Jersey Dep't of Law & Public Safety, 411 F.3d 427, 440 (3d Cir. 2005) ("the fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law. Plaintiffs' equal protection

claims under the Fourteenth Amendment require a wholly separate analysis from their claims under the Fourth Amendment.") (internal quotation omitted); United States v. Avery, 137 F.3d 343, 352 (6th Cir. 1997) ("the Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures.").

The City's argument that the race discrimination claim should be dismissed because Officer Hart had probable cause, is misplaced.

4. Hart as a Party

As noted above, plaintiff filed the original Complaint in this case on February 22, 2008. He named "State of Oregon, City of Portland Police Bureau" as defendants. Although Officer Hart is mentioned in the factual allegations and in connection with what I construe as the racial discrimination claim, he is not named in the caption of the original Complaint.

The Amended Complaint was filed on April 7, 2008. It names "Peter C. Hart PPB" as a defendant.

Both the original Complaint and the Amended Complaint assert that the events at issue occurred on February 22, 2006, two years before the original Complaint was filed.

The statute of limitations for filing a section 1983 action is determined by the forum state's statute of limitations for personal injury actions. Knox v. Davis, 260 F.3d 1009, 1012-13 (9th Cir. 2001) (citing Wilson v. Garcia, 471 U.S. 261, 276 (1985)). Under Oregon law, the statute of limitations for a personal injury action is two years. O.R.S. 12.110(1); see also Sain v. City of Bend, 309 F.3d 1134, 1139 (9th Cir. 2002) (appropriate statute of limitations

for section 1983 claims in Oregon is the two-year period in O.R.S. 12.110).

For the reasons explained in Young v. City of Portland, No. CV-04-1818-HU, Findings & Recommendation at pp. 4-14 (D. Or. June 9, 2005), adopted by Judge Haggerty (D. Or. July 27, 2005), Hart, despite being mentioned in the allegations of the original Complaint, was not a party until being named in the caption of the Amended Complaint on April 7, 2008.

April 7, 2008 is more than two years following the February 22, 2006 incident. Thus, to maintain a claim against Hart, plaintiff must show that the addition of Hart as a defendant relates back to the filing of the original Complaint.

Federal Rule of Civil Procedure 15(c) allows an amendment adding a party to relate back to the date of the original pleading if, within the 120-day period for service provided by Rule 4(m), the party to be brought in by amendment has received notice of the institution of the action such that the party is not prejudiced in maintaining a defense on the merits, and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party. Fed. R. Civ. P. 15(c).

In Young, I noted that some Ninth Circuit cases suggested that the relation back provisions of state law, not Rule 15(c), govern a federal cause of action pursuant to section 1983. Young, Findings & Rec. at p. 15. I concluded that regardless of whether Rule 15(c), or Oregon Rule of Civil Procedure 23C governed, the attempt to add the new defendant in Young was prohibited because there was no mistake concerning the identity of the proper party,

a requirement under either state or federal relation back provisions. Id. at pp. 17-19.

Since that decision, at least two judges in this Court have concluded that Federal Rule 15(c) applies to section 1983 actions, notwithstanding the suggestion in earlier Ninth Circuit cases that the state relation back provision applies. In Phillips v. Multnomah County, No. CV-05-105-CL, 2007 WL 915173, at *2-7, Opinion & Order (D. Or. Mar. 23, 2007), Judge Panner thoroughly discussed the issue. Judge King adopted Judge Panner's reasoning and conclusion in an October 2007 opinion. Duncan v. State of Oregon, No. CV-05-1747-KI, Opinion & Order at pp. 4-5 (D. Or. Oct. 4, 2007).

Judge Panner's decision in Phillips is persuasive and I follow it here. Accordingly, as indicated above, the addition of Hart will relate back to the original Complaint if, within the 120 days allowed for service under Rule 4(m), Hart has received notice of the institution of the action and knew or should have known that but for a mistake concerning his identity, the action would have been brought against him originally.

Plaintiff cannot establish the latter requirement. Assuming that Hart has received notice of the action, or will within the 120 day limit, a mistake under Rule 15(c) does not include accidentally failing to name a defendant in the caption of a complaint where the existence and name of the defendant are known to the plaintiff. E.g., Garvin v. City of Philadelphia, 354 F.3d. 215, 221-22 (3d Cir. 2003) ("an amended complaint will not relate back if the plaintiff had been aware of the identity of the newly named parties when she filed her original complaint and simply chose not to sue

them at that time."); Malesko v. Correctional Servs. Corp., 229 F.3d 374, 383 (2d Cir. 2000) (finding no "mistake" within Rule 15(c)(3)(B) when the plaintiff knew that he was required to name an individual as a defendant, but did not do so), rev'd on other grounds, 534 U.S. 61 (2001); Laboy v. Doe, No. Civ.A.02-248 JJF, 2004 WL 2980731, at *2 (D. Del. Dec. 17, 2004) (when record showed that the plaintiff had knowledge of the particular defendant when original complaint was filed, but did not name that defendant in the original complaint, plaintiff failed to show omission was a "mistake" within the meaning of Rule 15(c)); Mailey v. SEPTA, 204 F.R.D. 273, 276 (E.D. Pa. 2001) (Rule 15(c)(3)(B) "does not apply when a plaintiff simply omits from the original complaint a separate, unrelated party, regardless of whether the omission was unintentional.").

Here, the fact that plaintiff mentioned Officer Hart in the original Complaint indicates that he had knowledge of Hart's identity and actions at the time he filed it. As defendants note, plaintiff was certainly aware of Hart's identity from at least the time of the trial on his citation. Exh. 1 to Defts' Mem. in Support of Mtn to Dismiss (dkt #5). Thus, plaintiff cannot have failed to name Officer Hart within the limitations period as a result of a mistake as to Officer Hart's identity. As a result, because the applicable limitations period had expired at the time plaintiff first named Hart in the Amended Complaint on April 7, 2008, and because there is no relation back under Rule 15(c), plaintiff's race discrimination claim against Hart must be

dismissed with prejudice.[2]

CONCLUSION

Defendant City of Portland's motion to dismiss (#11), should be granted. Plaintiff's claims should be dismissed with prejudice.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due September 8, 2008. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due September 22, 2008, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 22nd day of August, 2008.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge

[2] I note that as in Young, this would be the result whether I followed Rule 15(c)'s relation back provision or Oregon's Rule 23C relation back provision because both contain the "mistaken identity" requirement.